

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF THE INTERIOR
MINERAL MANAGEMENT SERVICE**



Open and Nondiscriminatory Movement of)
Oil and Gas as Required by the Outer) **RIN 1010-AD17**
Continental Shelf Lands Act)

**COMMENTS
OF THE
ASSOCIATION OF OIL PIPE LINES**

Pursuant to the Notice of Proposed Rulemaking¹ issued by the Department of the Interior's Mineral Management Service ("MMS") in this proceeding, the Association of Oil Pipe Lines ("AOPL") submits its comments.

AOPL broadly supports the proposed regulations as they pertain to oil pipelines, which seek to strike an appropriate balance between ensuring the statutory rights of shippers and maintaining a less intrusive regulatory regime consistent with the limited nature of the relevant statute and the commercial context of transportation on the Outer Continental Shelf ("OCS").

I. IDENTITY AND INTEREST

The AOPL is an unincorporated trade association representing 49 oil pipeline companies that transport approximately 85% of the crude oil and petroleum products moved in the United States by pipeline. AOPL's comments represent the views of the petroleum pipeline industry. AOPL's members are subject to regulation by the Federal Energy Regulatory Commission ("FERC") with respect to their interstate operations, pursuant to the provisions of the Interstate Commerce Act ("ICA"). Many members of AOPL also own extensive pipeline systems

¹ *Open and Non-Discriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act*, 72 F.R. 17047 (April 6, 2007) ("NOPR").

transporting petroleum on the OCS. AOPL and its members therefore have a substantial interest in the regulations promulgated by the MMS regarding shipper rights and complaint procedures under the OCSLA.

II. COMMENTS

A. Background.

This rulemaking seeks to implement regulations that will protect shippers' rights to open and non-discriminatory access to pipelines traversing the OCS, pursuant to Sections 5(e) and 5(f) of the OCSLA. The NOPR states that the impetus for the rule was the decision of the D.C. Circuit in *Williams Cos. v. FERC*,² in which the Court found that the Federal Energy Regulatory Commission lacked the authority to impose extensive open access rules on pipelines operating on the OCS.³ The Court instead found in effect that enforcement of the statutory obligation of OCS pipelines to provide "open and non-discriminatory access to both owner and nonowner shippers," rested upon conditions of the right-of-way or lessee holders and that the Secretary of the Interior has the authority to enforce such conditions.⁴

The broader context for the proposed regulations must also include the history of OCS pipeline operation. The industry has built and operated an increasingly extensive pipeline network on the OCS over more than 50 years and has responded to shifts in both production and demand patterns. The long-standing approach to OCS pipelines, of both MMS and the FERC, had been a non-intrusive, more light-handed form of regulatory oversight than that which has been typically applied to onshore jurisdictional pipelines. The result has been a progressive growth in liquids pipelines to permit the more complete development of mineral resources in the

² 345 F.3d 910 (D.C. Cir. 2003) ("*Williams*").

³ The Court found that FERC had limited authority to enforce "ratable take" rights and issue expansion orders.

⁴ *Williams*, 345 F.3d at 913-914; statutory language quoted from OCSLA § 5(f), 43 U.S.C. § 1334(f).

OCS. At the same time, there has been a notable absence of complaints regarding the practices of OCS liquids pipelines.⁵ Therefore, the fundamental purpose of the proposed regulations should be to protect statutory shipper rights under the OCSLA and to ensure that the OCS pipelines are not burdened in a manner that would inhibit the vigorous growth needed to meet growing offshore production needs.

B. General Comments: AOPL Supports the Broad Direction and Content of the Proposed Rules.

In its ANOPR issued in 2004,⁶ the MMS initiated a broad inquiry into the proper scope of regulation, and sought particular evidence of whether access has been denied, or discrimination has occurred. The comments submitted to the ANOPR did not evidence any broad pattern of problems with access and discrimination as to OCS pipelines.

In response, the MMS has proposed a system of oversight that relies upon a flexible complaint process with both informal and formal resolution paths. The rules would provide for informal, “Hot Line” initiated proceedings, “alternative dispute resolution options, and written complaints.”⁷ The MMS has declined to create a rigid definition of “open access” or “nondiscriminatory access,” choosing instead to determine these concepts on a case-by-case basis, while applying a reasonableness standard.⁸ The proposed rules would require certain formal requirements for written complaints and answers,⁹ which would be resolved in a process that FERC would characterize as a “paper hearing.”¹⁰ The procedures would permit MMS to

⁵ Neither FERC nor MMS have received significant complaints despite the continued growth in OCS transportation.

⁶ “Advance Notice of Proposed Rulemaking and Announcement of Public Meetings,” *Open and Non-Discriminatory Movement of Oil and Gas as Required by the Outer Continental Shelf Lands Act*, 69 F.R. 19137 (April 12, 2004) (“ANOPR”).

⁷ The rules would also provide that fees be filed with written complaints. AOPL notes that the Surface Transportation Board similarly posts fees for formal complaints. *See e.g.*, 49 C.F.R. § 1002.2 (2006).

⁸ NOPR at 17048.

⁹ NOPR at 17049-17050.

¹⁰ NOPR at 17055.

seek information from the parties to a complaint, but without creating a system of routine reporting by pipeline carriers.¹¹ The regulations would permit submission of data under confidential seal, even for informal complaint procedures.¹²

Although particular aspects of the proposed rules might be resolved in more than one manner, AOPL submits that the procedures in the proposed rules generally apply the correct balance required by the structure of regulation pursuant to the OCSLA. The legislation does not require or support an intrusive and heavy-handed regulatory regime, nor is there any record of discriminatory problems that would support consideration of more complex or onerous procedures. The proposed rules instead provide guidance to shippers and to pipelines regarding the steps by which disputes as to open access, non-discriminatory transportation will be resolved, consistent with the limited scope of the OCSLA.

C. Comments in Response to Specific Questions.

The NOPR seeks responses to a short series of questions pertaining to specific aspects of the proposed regulations. AOPL's general position is set out above, but AOPL also provides answers to several of the specific questions below.

1. *Whether MMS should consider other methods of delivery assurance, e.g., electronic transmission, to satisfy parties' complaint and answer notification requirements.*

AOPL does not take a position on this question.

2. *Whether MMS should use a formal complaint resolution method other than that proposed.*

The MMS has proposed a simplified complaint procedure, to be resolved by paper hearings subject to administrative review. In light of the absence of a significant number of disputes in

¹¹ NOPR at 17054.

¹² NOPR at 17054-17055.

the past, this approach appears well-suited to the requirements of the statute. However, MMS should consider being flexible with respect to complaint procedures should individual circumstances suggest a need for different or additional procedures.

3. *Whether MMS's proposed treatment of OCSLA pipelines over which FERC exercises its Natural Gas Act or Interstate Commerce Act jurisdiction is adequate.*

With respect to oil pipelines, the proposed regulations properly presume that its procedures need not apply to pipelines regulated by FERC, which are already subject to open access requirements.

4. *Whether MMS should impose a time limit on the filing of complaints.*

The regulations should prescribe a limitation of actions with respect to complaints against pipelines under the OCSLA. Such a limitation is needed for the same reasons that limitations are imposed by statute or judicial principle in civil cases: (1) fairness to those defending against the complaints; and (2) the importance of proving claimed harm before the evidence becomes stale or unavailable. The ICA prescribes a limitation of two years for complaints seeking reparations,¹³ and the MMS should strongly consider adoption of a similar standard for complaints under these procedures.

5. *Whether an answer in response to a complaint should include specific information other than that required by the proposed rule.*

The proposed regulations require that answers include all documents supporting the answer that are in the possession of the carrier or are otherwise obtainable, including contracts and supporting affidavits. There does not appear to be a need for greater filing obligations. The procedures also contemplate that the Director will “review the pleadings and issue a decision,”

¹³ 49 U.S.C.A. App. § 16(3)(a).

which already makes the respondent responsible for submitting an answer that is full and persuasive.

6. *Whether the amount of the processing fee is fair, whether the payment by electronic funds transfer is feasible, and what form of identification should be used to submit fees to MMS.*

AOPL does not take a position on this question.

7. *Whether the proposed processing fees will materially affect the filing of complaints and whether the value of using the complaints process to complainants, transporters, and others of using the complaint process is fairly presented.*

AOPL does not take a position on this question.

8. *Whether processing fee waiver and reduction provisions should be retained.*

AOPL does not take a position on this question.

9. *Whether MMS should obtain information from persons who are not parties to a complaint.*

Whether MMS will need to take steps, in effect, to subpoena information from non-parties appears best left to determination on a case-by-case basis.

10. *Whether MMS should automatically stay each decision pending an appeal to the IBLA.*

AOPL does not take a position on this question

III. CONCLUSION.

As is discussed in detail above, the AOPL requests that the MMS consider its comments in preparing final regulations in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel R. Mihalik". The signature is fluid and cursive, with the first name "Daniel" written in a larger, more prominent script than the last name "Mihalik".

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